2010

Alliant Techsystems, INC. v. Salt Lake County Board of Equalization, Utah State Tax Commission, and Granite School District : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

ALLIANT TECHSYSTEMS, INC., Appellant, v. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and GRANITE SCHOOL DISTRICT, Appellees.	)	Case No. 20100029

OPENING BRIEF OF APPELLANT

APPEAL FROM THE FINAL ORDER OF
THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
THE HONORABLE JON M. MEMMOTT, TAX COURT JUDGE

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COMPLETE LIST OF ALL PARTIES

Alliant Techsystems, Inc. is not aware of any parties other than those identified in the caption of this Opening Brief of Appellant.

In the interest of clarity and brevity, Alliant Techsystems, Inc. shall be referred to herein as "ATK"; Appellee Salt Lake County Board of Equalization shall be referred to herein as "the County"; and Appellee Utah State Tax Commission shall be referred to herein as "the Commission."

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STATEMENT OF JURISDICTION

This is an appeal from a *Final Order on Application of Utah's Privilege Tax* (the "Final Order") entered on December 9, 2009,[1] by the Third District Court, the Honorable Jon M. Memmott, of the Second District Court, presiding as a tax judge. R. 1089–1091. A copy of the district court's Final Order is attached hereto as Addendum 1. Inasmuch as the Final Order incorporates the district court's *Ruling on Petitioner's and Respondents' Cross Motions for Summary Judgment* (the "Ruling") entered on November 12, 2009 (R. 1079–1087), this is also an appeal of that Ruling. A copy of the district court's Ruling is attached hereto as Addendum 2. This Court has jurisdiction pursuant to Utah Code Ann. § 59-1-608 and Utah Code Ann. § 78A-3-102(j).

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in its interpretation of the privilege tax exemption when it held that ATK had "exclusive possession" of certain exempt property even though the undisputed facts established that the United States Navy (the "Navy") retained management and control of and maintained a constant presence on that property? R. 1083–1084.

Standard of review: "'Because a challenge to summary judgment presents for review only questions of law, we accord no deference to the trial court's conclusions but review them for correctness.'" *Salt Lake County Bd. of Equalization v. Tax Comm'n,*

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[1] The Final Order is dated December 9, 2009, R. 1091, but the filing date of that Order is December 11, 2009. R. 1089.

2004 UT App 472 ¶ 10, 106 P.3d 182, 184 (quoting *Crossroads Plaza Ass'n v. Pratt*, 912 P.2d 961, 964 (Utah 1996)).

2. Did the district court err when it applied third party standing analysis under *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), *cert. denied*, 506 US 1022 (1992), to hold that ATK did not have standing to challenge the constitutionality of the privilege tax statute under the Supremacy Clause, even though: (1) ATK was not asserting the government's right, but its own right to be free from unconstitutional taxation; and (2) this Court has consistently held that a party which is financially affected by taxing decisions ***does*** have standing to allege unconstitutional discrimination against the federal government? R. 1085–1086.

Standard of review: "Standing issues are issues of law reviewed for correctness." *Haymond v. Bonneville Billing & Collections, Inc.*, 2004 UT 27, 89 P.3d 171, 173 (Utah 2004). "Because a challenge to summary judgment presents for review only questions of law, we accord no deference to the trial court's conclusions but review them for correctness.'" *Salt Lake County Bd. of Equal.*, 2004 UT App 472 ¶ 10, 106 P.3d at 184.

3. Inasmuch as Utah law requires a privilege tax assessment to be in "the same amount that the *ad valorem* property tax would be if the possessor or user were the owner of the property," Utah Code Ann. § 59-4-101(2) (2000), does this tax violate the Supremacy Clause by not permitting taxing entities to reduce the privilege tax assessment

by the value of the government's retained interest in exempt property when the permittee's beneficial use of exempt federal property is subject to the property owner's management, control, oversight, and other contractual limitations? R. 1086–1087.

Standard of review: "Because a challenge to summary judgment presents for review only questions of law, we accord no deference to the trial court's conclusions but review them for correctness.'" *Salt Lake County Bd. of Equal.*, 2004 UT App 472 ¶ 10, 106 P.3d at 184.

DETERMINATIVE LAW

> (1) (a) Except as provided in Subsections (1)(b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit.
>
> . . . .
>
> (2) The tax imposed under this chapter is the same amount that the *ad valorem* property tax would be if the possessor or user were the owner of the property. . . .
>
> (3) A tax is not imposed under this chapter on the following:
>
> . . . .
>
> (e) the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to ***exclusive possession*** of the premises to which the lease, permit, or easement relates. . . .

Utah Code Ann. § 59-4-101 (2000) (emphasis added).[2]

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[2] Citations to Utah statutes are to the 2000 version of the Utah Code.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of a decision by the district court granting summary judgment in favor of the County, the Commission, and the Granite School District and denying the motion for summary judgment filed by ATK, thereby upholding the County's privilege tax assessment against ATK for its beneficial use of exempt property owned by the Navy. R. 1087, 1089–1090.

B. Course of Proceedings

ATK and the County have had multiple valuation appeals pending in the Third Judicial District Court and before the Commission by which ATK, in addition to challenging valuation, has also challenged the County's right to assess privilege tax against ATK for its use of the Naval Industrial Reserve Ordnance Plant ("NIROP"). R. 747.

On March 31, 2008, the parties filed a Joint Motion For Entry of Order Resolving All Valuation Claims And For Stay Pending Transfer And Reassignment For Further Proceedings whereby the parties resolved all of their valuation disputes for tax years 1995 through 2000 and 2002 through 2007 with the exception of the privilege tax issue which was preserved for resolution by the district court. R. 748. The parties requested that the District Court transfer the privilege tax issue associated with the 2000 tax year to a tax court judge for resolution, and that all of the remaining cases for the other tax years be

stayed pending the resolution of the 2000 tax year case. *Id.* An order transferring ATK's appeal of the 2000 assessment to Judge Memmott, a tax judge, was issued on May 6, 2008. R. 766–769.

Subsequent to reassignment, ATK and the County filed cross-motions for summary judgment on the remaining privilege tax issue. R. 1079. The district court held a hearing on the motions on October 26, 2009. *Id.* On November 12, 2009, the court issued its "Ruling on Petitioner's and Respondents' Cross Motions For Summary Judgment" (the "Ruling") whereby it ruled in favor of the County. R. 1079–1087. On December 11, 2009, the district court filed its "Final Order on Application of Utah's Privilege Tax" (the "Final Order"). R. 1089–1091. On January 5, 2010, ATK filed its Notice of Appeal. R. 1093.

C. <u>District Court's Disposition of the Case</u>

1. The district court concluded that the material facts were not in dispute and adopted the factual assertions of the parties' pleadings as its own factual findings. R. 1081, 1090.[3]

2. The district court held that ATK's use of NIROP was pursuant to a permit and that ATK is considered to be a "permittee." R. 1082–1083.

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[3] The County had filed a Motion to Strike Portions of the Affidavit of Kim J. Abplanalp, which was filed by ATK in support of its Motion for Summary Judgment. The district court denied the County's motion to strike. R. 1090, n. 1.

3. The district court held that exemptions against the privilege tax should be strictly construed, but that the statutory language must be interpreted literally. R. 1083.

4. ATK relied on *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102 (Utah 1998), for the proposition that a lease transfers exclusive possession, but a permit does not. The district court held that *Keller* did not apply because the pending matter was not a forcible entry action. *Id.*

5. The district court held that, even though the Navy retained possession, management, and control of NIROP, ATK nevertheless had "exclusive possession" of NIROP. R. 1084, 1090.

6. According to the district court, the "exclusive possession" determination must be made without consideration of whether the property owner retains any possession or control of the exempt property. *Id.* The court held that the only way a lessee or permittee can demonstrate that it has less than exclusive possession and is exempt from privilege tax is to prove that someone "other than the landowner" shares possession with the lessee or permittee. R. 1090.

7. The district court also held that the Navy's possession, management, and control could not defeat ATK's exclusive possession because it was "ancillary to ATK's operations and, therefore, beneficial to ATK." R. 1084.

8. The district court held that ATK did not have standing to assert that the assessment of a privilege tax on the full value of NIROP violated the Supremacy Clause

by imposing a tax on the value of the Navy's retained interest in that property. R. 1086, 1091. The district court believed that ATK was "rais[ing] the issue on behalf of the United States government" and was thereby required to satisfy third-party standing requirements. *Id.*

9. The district court held that, even if ATK had standing to assert a constitutional violation, the privilege tax did not violate the Supremacy Clause because ATK had exclusive possession of NIROP. R. 1086–1087, 1091.

10. The district court also held that the Supremacy Clause had not been violated because the privilege tax had been apportioned according to ATK's beneficial use of NIROP. R. 1086–1087.

D. Statement of Relevant Facts

1. The NIROP property is located adjacent to property owned by ATK at its Bacchus Works plant. It is comprised of six (6) parcels that constitute approximately 528.48 acres of land and improvements owned by the United States Navy. R. 748–749.[4]

2. The parties agreed to valuations established by the Commission following an evidentiary hearing. R. 953 ¶ 14. The Commission used an RCNLD cost approach which included deductions for obsolescence. *Id.*

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[4] Some of the citations to the record in this section are to the Parties' memoranda filed in support of their cross-motions for summary judgment inasmuch as the district court adopted those assertions as its factual findings in this case. R. 1081, 1090.

3. The Commission concluded that 15 of the 181 improvements located at NIROP no longer contributed value to NIROP and did not assess any value for those improvements. *Id.* ¶ 16.

4. The six parcels that comprise the NIROP property and the values assessed to these parcels are:

	Parcel No.	Land	Buildings	Total
1.	20-03-100-001-6001	$ 724,300	$ 0	$ 724,300
2.	20-03-400-002-6001	5,700	0	5,700
3.	20-04-100-001-6001	443,100	0	443,100
4.	20-04-200-001-6001	2,873,100	35,062,500	37,935,600
5.	20-04-400-001-6001	114,000	0	114,000
6.	20-04-400-002-6001	116,900	0	116,900

R. 749 ¶ 2.

5. The Navy owns all real property at NIROP, including the real estate and all buildings. *Id.* ¶ 3. The Navy also owns the vast majority of the equipment used at the NIROP facility. *Id.*

6. NIROP is physically separated from the surrounding properties by a chain link fence that identifies the NIROP property as U.S. Government property, warns trespassers to keep out, and excludes the public. *Id.* ¶ 4.

7. Only authorized personnel are allowed access to NIROP. *Id.* ¶ 5.

8. NIROP is used in the manufacture of missile rocket motors for the Navy's Fleet Ballistic Missile (FBM) programs. The missile rocket motors produced at NIROP have included the Trident II (commonly called D-5); Trident 1 (commonly called C-4), the Poseidon (commonly called C-3), and Polaris (commonly called C-4). *Id.* ¶ 6.

9. ATK is granted access to NIROP pursuant to a "Facilities Use Contract" with the Navy's Strategic Systems Programs ("SSP"), in order to fulfill contracts and subcontracts that ATK has with the Navy. R. 750 ¶ 7.

10. ATK's use of NIROP is controlled and restricted by the Facilities Use Contract. *Id.* ¶ 8, R. 902.

11. ATK cannot use NIROP property other than as directed by the Facilities Use Contract, absent written permission obtained from the government. R. 750 ¶ 9.

12. ATK must give first priority of use of NIROP to work on behalf of Navy programs. R. 649, 750 ¶ 8.

13. ATK has no authority to exclude the government or anyone authorized by the government from entering NIROP or using NIROP facilities. R. 751 ¶ 17.

14. The government can and does refuse to give permission to ATK to use NIROP property. R. 751 ¶ 16.

15. The "unauthorized use of government property can subject a person to fines, imprisonment, or both, under 18 U.S.C. 641." R. 725, 750 ¶ 11, 840.

16. The Navy, through the SSP, has direct management responsibility for NIROP. As manager, the SSP can and does limit ATK's use of NIROP and tells ATK what it can and cannot do with NIROP property. R. 83, 625 (p. 95:25–96:4), 750 ¶ 10, 1084, 1090.

17. SSP personnel are on the NIROP property on a daily basis and are in frequent communication with ATK regarding all aspects of maintenance, operation, and facility usage. R. 750 ¶ 13 – 751 ¶ 14, 1084.

18. For the year in question, the local Navy office maintained approximately 14 personnel on-site at the ATK facilities to manage maintenance, operation, and usage of the NIROP facilities and to supervise the FBM program. *Id.*

19. Title to any and all improvements ATK may erect at NIROP is vested in the Navy unless there is a specific agreement to the contrary. ATK has no right to remove these improvements and cannot use them without permission from the Navy. R. 751 ¶ 15.

20. Capital improvements to NIROP, major maintenance, and repairs must be approved by the SSP as provided by a separate non-profit contract with ATK, called a Capital Maintenance Contract. R. 751 ¶ 19. The Navy pays for all major maintenance and repairs. *Id.*

SUMMARY

ATK has appealed the County's assessment of privilege tax for ATK's use of NIROP on the grounds that Utah law does not permit an assessment when the beneficial

user of exempt property does not have "exclusive possession" of that property. The district court held that the property owner's retained possession and control of the exempt property is not relevant to a determination of whether the beneficial user has exclusive possession of the property. ATK has also claimed that a privilege tax assessment on the full value of exempt property when an owner retains possession and control is an unconstitutional violation of the Supremacy Clause. The district court held that ATK did not have standing to raise a constitutional challenge and also that Utah's privilege tax laws are not unconstitutional.

The district court admits that it is bound by the plain language of the exemption. Nevertheless, the court found that a property owner's retained possession and control is not relevant to the determination of whether the beneficial user has "exclusive possession." This interpretation ignores the "obvious limitations" inherent in the word exclusive. *Loyal Order of Moose, #259 v. County Bd. of Equalization*, 657 P.2d 257 (Utah 1982). It also ignores this Court's prior decisions which recognize that a lessee or permittee does not have exclusive possession when the owner retains management and control and the lessee or permittee has no right to exclude the owner from the property. *Keller*, 959 P.2d at 107. The court's decision also violates a cardinal rule of statutory constriction by inferring terms and conditions which have no basis in the statute's plain language. If this Court reverses the district court's interpretation of the privilege tax exemption, then the Supremacy Clause argument is moot.

However, if the Court concludes the Navy's retained possession and control of NIROP is irrelevant to the determination of whether ATK has "exclusive possession" of NIROP, then it must also determine whether that interpretation violates the Supremacy Clause of the U.S. Constitution.

Salt Lake County vigorously asserted that ATK did not have standing to claim a Supremacy Clause violation even though, in prior cases, the County has successfully claimed that its own financial stake in tax assessments gave it standing to raise constitutional challenges to assessments. Because ATK is directly and economically impacted by the privilege tax assessment, the same principle applies here and the district court's decision to apply third party standing analysis is reversible error.

The district court's decision to uphold the assessment despite retained possession and control by the Navy results in an unconstitutional interpretation of the privilege tax laws. The value of the beneficial use of exempt property is diminished by the extent to which the property owner retains possession and control of the property. Inasmuch as Utah law does not permit the assessment to be based on the value of the permittee's beneficial use of the exempt property, the assessment on the full value of the exempt property violates the Supremacy Clause by taxing the user on the value of the owner's retained interest in that property.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT A BENEFICIAL USER IS IN "EXCLUSIVE POSSESSION" OF EXEMPT PROPERTY EVEN THOUGH THE OWNER RETAINS POSSESSION AND CONTROL.

Under Utah Code Ann. § 59-4-101(1)(a), "a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit." However, the privilege tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to ***exclusive possession*** of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e) (emphasis added).

This appeal requires the Court to interpret the meaning of this exemption to the privilege tax statute. When interpreting a statutory exemption, a court should adhere to the following "well-settled canons of statutory construction":

> First, we construe statutes that grant exclusions from taxation strictly against the party seeking an exemption, and that party accordingly bears the burden of proving that it qualifies for the exemption sought. Second, in construing any statute, 'we first examine the statute's plain language and resort to other methods of statutory interpretation only if the language is ambiguous.' Accordingly, we read the words of a statute literally unless such a reading is unreasonably confused or inoperable, and give the words their usual and accepted meaning. Third, the reviewing court does not look beyond plain and unambiguous language to ascertain legislative intent. Finally, we presume that the 'statute is valid and that the words and phrases used were chosen carefully and advisedly.'

Gull Labs., Inc. v. Utah State Tax Comm'n, 936 P.2d 1082, 1084 (Utah Ct. App. 1997) (quoting *US Xpress, Inc. v. Utah State Tax Comm'n*, 886 P.2d 1115, 1117 (Utah Ct. App. 1994)).

The district court's interpretation of the exemption constitutes reversible error. The district court ignored the requirement that it "read the words of [the] statute literally" when, despite the Navy's acknowledged presence on NIROP, the court held that ATK's possession of the exempt property was "exclusive." The district court also failed to "give the words their usual and accepted meaning" when it ignored this Court's determination that a lessee or permittee does not have exclusive possession of property when the property owner retains management and control of that property. *Keller*, 959 P.2d at 107. Finally, the district court's suggestion that the Navy's presence does not diminish ATK's possession because it is "beneficial to ATK," ignores the "cardinal rule of statutory construction [] that courts are not to infer substantive terms into the text that are not already there." *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994).

A. ATK Does Not Have "Exclusive Possession" Under The Plain, Unambiguous Language of the Exemption.

Although a statutory exemption must be interpreted narrowly, the reviewing court is still required to "read the words of [the] statute literally." *Gull Labs., Inc.*, 936 P.2d at 1084. A court does not have the discretion to "look beyond plain and unambiguous language to ascertain legislative intent" or to otherwise narrow the scope of the exemption. *Id.* Notwithstanding this mandate, this district court held as follows:

> "[B]ecause the Court is to interpret taxation statutes strictly against ATK . . . the Court concludes that ATK was in exclusive possession of its permit . . . even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. ATK has presented no evidence or argument that anyone other than the Navy, the land-owner, had any possession, use, management, or control of the NIROP Property during 2000."

R. 1084. The district court's finding that "exclusive possession" can exist despite possession and control retained by the property owner is inconsistent with plain statutory language and impermissibly narrows the scope of the exemption.

"Exclusive possession" as used in Utah Code Ann. § 59-4-101(3)(e) should be interpreted to mean what a reasonable person would understand "exclusive possession" to mean: "(a) excluding or having power to exclude; (b) limiting or limited to possession, or control, or use by a single individual or group." http://www.merriam-webster.com/dictionary/exclusive. The undisputed facts in this case establish that ATK does not have sole or "exclusive" possession of NIROP. The Navy maintains a ***constant*** presence on the NIROP property, R. 750–751, 1084, and employs personnel whose specific duties are to manage the NIROP facilities and the FBM program. R. 750. Furthermore, ATK has no right to exclude the Navy or anyone authorized by the Navy from entering NIROP or using NIROP facilities. R. 751 ¶ 17.

The district court held that the land-owner's retained possession and control is not relevant to whether the beneficial user has "exclusive possession" of the exempt property.

R. 1090. Yet ATK's possession of NIROP cannot be "exclusive" so long as the Navy shares possession and control.

This Court has held that the word "exclusive" implies specific limitations and an expansive interpretation ignores those clear limitations. *Loyal Order of Moose*, 657 P.2d at 263. Over a number of years, the Utah Supreme Court had granted tax exemptions to charitable entities even though the charitable use of the property was less than "exclusive." In *Loyal Order of Moose*, the Court acknowledged that it had "stretched the 'used exclusively' provision beyond its clear meaning" and ignored its "obvious limitations." *Id.* at 263. The Court overruled its broadened interpretations" where a less than exclusive charitable use of property had been deemed sufficient to qualify an organization for a tax exemption and determined to give strict construction to the meaning of the phrase "used exclusively."

The district court ignored this Court's acknowledgment of the inherent limitations of the word "exclusive" when it concluded that ATK's possession of NIROP was "exclusive" even though the Navy maintained a constant presence on that property and ATK had no right to exclude the Navy, or anyone authorized by the Navy, from access, control, or use of the NIROP facilities. R. 751, 1084. The phrase "exclusive possession" cannot be equated with "shared possession" even if the party which shares possession is the property owner. The plain language of the statute simply cannot be read to carve out this judicially created exception.

In at least two other instances, this Court and the Utah Court of Appeals have refused to ignore the plain language of certain privilege tax exemptions, considering themselves bound by the express language of those exemptions. In *Salt Lake County Bd. of Equalization v. Tax Comm'n* the Court of Appeals would not restrict the scope of the "concessionaire" exemption by imposing restrictions which were not found in the plain language of that particular privilege tax exemption. 2004 UT App 472, 106 P.3d 182. The Salt Lake County Board of Equalization (also the Appellee in this matter) urged the court to adopt a stricter definition of "concession" based on the court's duty to "interpret [the exemption] strictly against the party seeking the exemption." *Id.* ¶ 18, n. 5. The court rejected the Board's request holding that "nothing in the plain language of the concession exemption statutes [] compels this result nor is the language of the statute ambiguous." *Id.* ¶ 18.

In *County Bd. of Equalization v. Utah State Tax Comm'n*, 927 P.2d 176, 184 (Utah 1996), this Court was asked to interpret the privilege tax exemption for "the use or possession of property where the ***proceeds*** inure to the benefit of a religious, educational, or charitable organization and not to the benefit of any other person." Utah Code Ann. § 59-4-101(3)(c) (1992) (emphasis added). The Board argued that the term "proceeds" meant <u>all</u> business income. This Court rejected the Board's interpretation, concluding that the plain meaning of "proceeds" was the "rents derived *from* the property, not the lessee's business income or profits." *Id.* at 179 (emphasis in original). Even though the

Court's interpretation of "proceeds" fully exempted all leases in Research Park from privilege taxes, the Court considered itself bound by the plain language of the exemption. It held that "the 'gap-closing' purpose of the privilege tax statute" does not justify narrowing the interpretation of exemptions because that argument "essentially urges the elimination of *all* exemptions from the privilege tax statute."[5]

The district court ignored the plain meaning of "exclusive" when it held that the possession and control exercised by the landowner did not diminish the possession and control exercised by the beneficial user of the exempt property. The statute does not exempt possession by the landowner from consideration of whether the beneficial user has "exclusive possession." The district court erred when it refused to give effect to the plain meaning of "exclusive" based on its perceived duty "to interpret taxation statutes strictly against ATK." R. 1084. *Salt Lake County Bd. of Equalization*, 2004 UT App 472

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[5] There is no question that applying the exemption according to its plain language would result in the value of the NIROP escaping taxation. However, that outcome is the direct result of the legislature's creation of an exemption from privilege tax when the beneficial user does not have "exclusive possession" of the property. After this Court provides the proper interpretation of the exemption, the legislature, if it so chooses, can act to close that gap just as the Nevada legislature did after the court rejected the privilege tax assessment in *United States v. Nye County*, 938 F.2d 1040, 1042 (9th Cir. 1991), *cert. denied*, 503 U.S. 919, or as the Utah legislature acted to amend the privilege tax exemption at issue in *Evans & Sutherland* after this Court's decision that the plain meaning of "proceeds" was "rent" paid by the lessee for use of the exempt property. However, it is not the province of this Court to ignore the plain language of the exemption in order to "close the gap" in the privilege tax laws. *ExxonMobil v. Utah State Tax Comm'n*, 2003 UT 53 ¶ 22, 86 P.3d 706, 711-712 (Utah 2003) (courts should avoid "ends-based statutory interpretation" in light of legislature's ability to amend statutes to "achieve the desired revenue.").

¶ 18, n. 5, 106 P.3d at 186, n. 5. This Court should give effect to the plain meaning and "obvious limitations" of "exclusive possession," and hold that ATK's use of the property–under the direction and control of the Navy–does not fall within the "usual and accepted meaning" of "exclusive possession."

B. The Court Erred When It Ignored This Court's Prior Interpretations Of "Exclusive Possession" Thereby Failing To "Give the Words Their Usual And Accepted Meaning."

When interpreting a statutory exemption, a court must "presume that the 'statute is valid and that the words and phrases used were chosen carefully and advisedly.'" *Gull Labs., Inc.*, 936 P.2d at 1084 (quoting *US Xpress, Inc.*, 886 P.2d at 1117). Not only does the district court's interpretation ignore the plain meaning of "exclusive," but it disregards the usual, accepted, and well-established meaning of the phrase "exclusive possession"as it pertains to leases and permits.

In *Keller v. Southwood N. Med. Pavilion, Inc.*, this Court interpreted the phrase "exclusive possession" and found that it does not exist when the person in possession of property is "'subject to the management and control retained by the owner.'" 959 P.2d at 107. Because "exclusive possession" requires an examination of whether the ***owner*** has retained control and management, the district court erred when it held that the Navy's retained interest in NIROP was irrelevant to a determination of whether ATK had "exclusive possession" of NIROP. R. 1090.

In *Keller*, the plaintiff sued for forcible entry when the property owner removed signs he had affixed to a monument. The Utah Supreme Court held that a claim for forcible entry could only be made if the claimant had a leasehold interest in real property. According to the Court, "A lease must convey a definite space and must transfer ***exclusive possession*** of that space to the lessee." *Id.* (emphasis added). The court concluded that Dr. Keller did not have a leasehold interest in the monument because he did not have ***exclusive possession*** of any space on that monument. The Court explained that the owner "retained management and control" of the monument under the terms of the agreement and that, despite the parties' characterization of the agreement as a lease, it was, in fact, a license. *See also, Enerco, Inc. v. SOS Staffing Servs.*, 2002 UT 78, 52 P.3d 1272 (a lease "must convey a definite space and must transfer exclusive possession of that space to the lessee."); *Smith v. Ogusthorpe*, 2002 UT App 361 ¶ 38, 58 P.3d 854, 862 ("a leasehold transfers exclusive possession").

The Court contrasted a lease with a license which "'is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein,' and is 'subject to the management and control retained by the owner.'" *Keller* at 107 (citing 25 Am. Jur. 2d *Easements and Licenses* § 137 (1996) and 49 Am. Jur. 2d *Landlord and Tenant* § 21 (1996)). The Court's reference to 49 Am. Jur. 2d *Landlord and Tenant* § 21 is particularly instructive inasmuch as that provision

explains that a lessee does not have exclusive possession ***unless it has the right to exclude the property owner***:

> The lessee's possession of the leased premises is essential to the character of a lease. To create a leasehold estate, the tenant must be vested with exclusive possession of the property to the lessee, ***even against the owner of the fee.*** In addition, there is authority for the view that although a person may be in possession of the premises, he or she is not a 'lessee' unless he or she also has exclusive control of the premises.

49 Am. Jur. 2d *Landlord and Tenant* § 21 (1996) (emphasis added).

The district court refused to follow *Keller* for two reasons. First, the district court held that the *Keller* Court's exclusive possession analysis was "appropriate for forcible entry actions," but did not apply to privilege tax analysis. Second, the court concluded that application to this case "would render the language of Utah Code Ann. § 59-4-101 non-sensical." R. 1083. According to the district court, ATK's interpretation would mean that "the privilege tax could only be assessed against a landowner in fee-simple." R. 1084. The court was wrong on both points.

1. The *Keller* Court's explanation that "exclusive possession" is a defining characteristic of a lease must be broadly applied.

The *Keller* analysis cannot be dismissed just because Dr. Keller was pursuing a claim for unlawful detainer. Before such a claim could be lawfully asserted, this Court had to determine the nature of Dr. Keller's interest in the property. The Court explained, "Because the trial court's finding of a forcible entry turns on its conclusion that Keller had a valid leasehold in real property, ***we must first determine if a leasehold existed.***"

959 P.2d at 107 (emphasis added). The nature of that interest did not depend upon the claim being pursued, but was an essential preliminary determination necessitating the Court's examination of the nature of the interest conveyed by the property owner.

Inasmuch as "exclusive possession" is a defining characteristic of a lease, it is logical that the Legislature would use that phrase in the privilege tax provisions inasmuch as privilege tax can only be assessed when otherwise exempt property is used for beneficial purposes pursuant to a "lease, permit, or easement." Utah Code Ann. § 59-4-101. Because "exclusive possession" is a characteristic of leased property and the privilege tax must be imposed on the ***full value*** of the exempt property, the statute exempts beneficial use of exempt property from the privilege tax when the lessee or permittee does not have ***"exclusive possession*** of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e).

In this appeal, the district court was required to determine the nature of ATK's interest in the property before it could determine whether ATK is exempt from the privilege tax. The district court concluded that ATK did not have a lease, but that its use of NIROP was pursuant to a permit. R. 1082–1083. Thus, the *Keller* Court's determination that a lease transfers exclusive possession, whereas a license or permit does not, is material to the interpretation and application of the exemption in this matter.

2. ATK's assertion that a lessee or permittee cannot have exclusive possession when the property owner retains possession and control does not render the statute "unreasonably confused and inoperable."

According to the district court, if exclusive possession required consideration of the retained interest and control exercised by the owner, then "the privilege tax could only be assessed against a landowner in fee-simple." R. 1084. The district court held that "[s]uch a reading is 'unreasonably confused and inoperable,' because the landowner in fee simple, the Navy, is exempt from property taxes under Utah Code Ann. § 59-2-1101(3)(a)." *Id.*

The court's characterization of ATK's definition of "exclusive possession" exhibits a fundamental misunderstanding of the position taken by ATK in the proceeding before the court. ATK relied on *Keller* to demonstrate that a lessee can have "exclusive possession" of property, but a permittee cannot. The district court's claim that ATK's definition would only allow a privilege tax assessment against a landowner in fee-simple ignore's this Court's multiple declarations that "exclusive possession" is a defining characteristic of a lease. *Keller*, 959 P.2d at 107, *Enerco, Inc.*, 2002 UT 78 ¶ 22, 52 P.3d at 1275 (a lease must "'convey a definite space and must transfer exclusive possession of that space to the lessee.'"); *Smith*, 2002 UT App 361 ¶ 38, 58 P.3d at 862 ("a leasehold transfers exclusive possession"). Because a lessee typically has exclusive possession of the leased property, the exemption will usually not apply when the nature of the beneficial user's interest is a lease. Thus, ATK's interpretation is neither confused nor inoperable.

ATK recognizes the appropriateness of privilege tax when a beneficial user has exclusive possession of exempt property and in no way asserts that privilege taxes "could only be assessed against a land-owner in fee simple." R. 1084.

In contrast, the district court's interpretation is that the beneficial user of property must be taxed on the full value of that property even if its use of that property is limited by the property owner's retained possession and management. A privilege tax assessment is not based on the value of the beneficial use of the property, but instead "is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property." Utah Code Ann. § 59-4-101(2). Therefore, if a lease, permit, or easement allows the beneficial user to use the exempt property only three days out of a week, and the exempt owner has possession of the property on the other four days, then, according to the district court's interpretation, the lessee or permittee will be liable for a privilege tax on the full value "of the premises to which the lease, permit, or easement relates." The statute contains no mechanism whereby the privilege tax can be reduced to reflect the value of the user's beneficial interest. Clearly a tax on the full value of property when a licensee or permittee does not have exclusive possession and "is subject to the management and control retained by the owner," would tax more than the value of "the possession or other beneficial use" of such property. *Id.* at § 59-4-101(1). The inclusion of the exemption for less than "exclusive possession" of exempt property insures that the beneficial user is not taxed on the value of property he does not possess

and insures the continued validity of Utah's privilege tax. *See* discussion *infra* at Section III.

The district court also rejected ATK's definition of "exclusive possession" because "the language of the statute contemplates that a person may have exclusive possession under a lease, a permit, or an easement." The statutory reference to "any lease, permit, or easement," does not imbue such conveyances with the characteristics they purport to exhibit. Instead, it simply means that any such conveyance is only subject to the privilege tax if the document, no matter what the title, conveys "exclusive possession of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e). In *Keller*, Dr. Keller's interest in the monument was conveyed by a "lease agreement." Notwithstanding the parties' characterization of the agreement as a "lease," this Court concluded that the agreement was, in legal fact, a license, stating, "a court is not bound by the parties' characterization of their transaction or by any title they may have given a writing." *Keller*, 959 P.2d at 107.

Like Dr. Keller, ATK has "'permission or authority to engage in a particular act or series of acts upon the land of another," but that permission is "'subject to the management and control retained by the owner.'" *Keller*, 959 P.2d at 107. Although ATK has beneficial use of the federally-owned land, it does not have "exclusive possession" because it does not have "exclusive control of the premises." *Gibson v. Greenfield*, 561 S.W.2d 689, 690 (Mo. Ct. App. 1978) (party in possession of premises

was not a lessee "unless he also had exclusive control of the restaurant"), 49 Am Jur 2d *Landlord and Tenant* § 21. The district court's ruling that a permittee has "exclusive possession" even though a land-owner retains possession of the property ignores previous rulings by this Court and is reversible error.

C. The District Court Erred When it Looked Beyond the Plain and Unambiguous Exemption Language to Infer Exceptions.

Interpretive principles which apply to statutory exemptions require a court to give effect to the "plain and unambiguous language" of the exemption. However, it is also a cardinal rule of statutory construction that courts are not to "infer substantive terms into the text that are not already there." *Berrett*, 876 P.2d at 370. The district court violated this cardinal rule when, despite its acknowledgment that the Navy retained management, control, and possession of NIROP, R. 1083–1084, it refused to apply the exclusive possession exemption because "no one else other than the landowner (i.e., the Navy) had possession, use, management, or control of the NIROP property during 2000," R. 1090, and because "much of the management and control exercised by the Navy on the NIROP property was ancillary to ATK's operations and, therefore, beneficial to ATK." R. 1084.[6]

The statute plainly states that privilege tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles

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[6] The district court cited to *Loyal Order of Moose*, 657 P.2d 257, in support of this conclusion. However, that case does not support the Court's creation of an exception for shared possession which benefits the taxpayer. If anything, the cited case supports ATK's interpretation inasmuch as this Court acknowledged the inherent limitations of the word "exclusive." *See* discussion *supra* at 16–17.

the lessee to ***exclusive*** possession of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e) (emphasis added). The statute does not create an exception when the property owner shares possession or when the possession or control exercised by another party is "beneficial to" the user of the exempt property. The interpretation of the exemption must be based on the language used in the statute, *Associated Gen. Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112 ¶ 30, 38 P.3d 291, 301, and there is simply no language within that statute which supports the district court's interpretation. *Salt Lake County Bd. of Equalization*, 2004 UT App 472 ¶ 18, n. 5, 106 P.3d at 186, n. 5.

Under the district court's interpretation, the exemption would be effectively rewritten as follows:

> [A privilege tax is not imposed on] the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. ***A lessee or permittee will be deemed to have exclusive possession when possession is shared only with the property owner or is beneficial to the lessee or permittee.***

Because the legislature did not define "exclusive possession" as including possession by the owner or by other parties which may benefit the lessee or permittee, it is not the province of the judiciary to infer such substantive terms. *Berrett*, 876 P.2d at 370.[7]

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[7] The district court's characterization of the Navy's management and control as "beneficial to ATK" ignores the fact that ATK's use of NIROP was for the express purpose of providing contracted services ***for the benefit of the Navy***. The district court acknowledged that the Navy was "provid[ing] technical assistance to ATK in their fulfillment of ***Navy*** contracts," and that it was "manag[ing] the NIROP property and

Control, management, and possession by an exempt property owner unquestionably diminishes the possession, independence, and control exercised by the beneficial user. The recognition of the property user's surrender of independent control of exempt property in furtherance of the property owner's interests may very well account for the Legislature's creation of the exclusive possession exemption to the privilege tax. ATK's right to use NIROP is for the express purpose of fulfilling its contracts with the Navy. The Navy retains possession, management, and control of NIROP to insure that ATK complies with its contractual obligations to the Navy. This presence by the Navy provides no basis for disregarding the plain and unambiguous language of the privilege tax exemption.

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT ATK DID NOT HAVE STANDING TO RAISE THE SUPREMACY CLAUSE CHALLENGE.

A central premise of statutory interpretation is "that every effort should be made to interpret [the statute] as being consistent with the dictates of the constitution." *Logan v. Utah Power & Light Co.*, 796 P.2d 697, 700 (Utah 1990), *see also Due South, Inc. v. Dep't of Alcoholic Bev. Control*, 2008 UT 71 ¶ 39, 197 P.3d 82, 93. Under Utah law, a privilege tax assessment is based on the entire value of the exempt government property. Utah Code Ann. § 59-4-101(2). Inasmuch as the district court found that the government retains some possession and control of the property, ATK has argued that an assessment

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assist[ing] ATK in the fulfillment of ***Navy*** contracts." R. 1084.

on the full value of the property taxes the government's retained interest in such property. Because the Supremacy Clause of the Constitution of the United States forbids states from imposing a tax on the United States or its agencies, *Thiokol Chemical Corp. v. Peterson*, 393 P.2d 391, 393 (Utah 1964), ATK claimed that the district court's adoption of the County's interpretation of the privilege tax exemption would violate the Supremacy Clause by taxing the government's retained interest in NIROP.[8]

The district court held that ATK did "not have standing to raise this issue on behalf of the United States government." R. 1085. According to the district court, by claiming that the assessment of a privilege tax on ATK's use of NIROP violates the Supremacy Clause, ATK was asserting the rights of the federal government. It held that ATK was not permitted to assert such rights unless the test for third party standing set forth in *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), had been satisfied. R. 1085–1086. The district court applied that test and concluded that ATK did not meet the third party standing requirements. *Id.*

The district court's standing determination is reversible legal error. ATK is directly impacted by the unconstitutional interpretation of the privilege tax law and, therefore, is asserting ***its own right*** to be free from unconstitutional taxation, not the

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[8]This Court recently issued a decision in which it upheld the constitutionality of the privilege tax statute as it applies to ***leases*** of exempt property. *ABCO Enters. v. Utah State Tax Comm'n*, 2009 UT 36, 211 P.3d 382. The issue in this appeal is not governed by the outcome of that case inasmuch as ATK is not a lessee of NIROP and because ATK is asserting the application of a specific privilege tax exemption which was not at issue in *ABCO*.

rights of a third party. This Court has held, on more than one occasion, that when a party is economically impacted by taxing law, it does have standing, independent of the property owner, to challenge the constitutionality of that law. *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451 (Utah 1985) and *County Bd. of Equalization*, 927 P.2d 176.

In *Kennecott Corp.*, Salt Lake County appealed the alleged underassessment of Kennecott's mining properties. The major issue in that appeal was whether the County had standing to appeal Kennecott's assessment. This Court applied traditional standing criteria which are that "(a) the interests of the parties be adverse, and (b) the parties seeking relief have a legally protectible interest in the controversy." *Id.* at 454. The Court recognized that, if Kennecott's properties were underassessed, "then the county 'suffer[s] some distinct and palpable injury that gives [it] a personal stake' in the assessed value of state-assessed property." *Id.* The unquestionable right of a litigant to question the constitutionality of a tax when that litigant is financially impacted by the assessment of an alleged unconstitutional tax was explained by the Court as follows:

> Clearly, the decision of assessing authorities is subject to judicial review when they value property pursuant to a statute or method claimed to be unconstitutional, or have otherwise acted outside their statutory authority. 'When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutionality or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity.'

Id. at 455 (quoting *Stanley v. Supervisors of Albany*, 121 U.S. 535, 551 (1887)).

In *County Bd. of Equalization*, this Court confirmed the right of an entity impacted by the interpretation of tax laws to challenge the constitutionality of those laws.[9] The Salt Lake County Board of Equalization (the same County Appellee in this case) had challenged the Commission's decision that Evans & Sutherland was exempt from privilege tax, contending that the Commission's interpretation discriminated against the federal government. The federal government was not a party to the proceeding. Nevertheless, this Court held that the Board had "standing to raise these constitutional claims." 927 P.2d at 181. This holding was based on the Court's recognition in *Kennecott* of a party's right to challenge determinations by the Tax Commission that have a direct economic impact on that party. *Id.*

ATK discussed this case at the hearing and argued that it supported the recognition of ATK's standing. The County was aware of this precedent inasmuch as it was the same party which had asserted standing to raise constitutional claims in the earlier case and, in both cases, was represented by the same counsel. Nevertheless, the County vigorously opposed ATK's right to challenge the constitutionality of its interpretation of the privilege

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[9] At the hearing, ATK referred to *County Bd. of Equalization v. Utah State Tax Comm'n* as "*Evans & Sutherland*" because Evans & Sutherland was a respondent in the appeal and was the lessee of the exempt property on which the County had assessed a privilege tax. Because the district court misunderstood ATK's reference, it failed to give consideration to this Court's recognition that an economically impacted party has standing to challenge the constitutionality of a taxing provision. Instead, the district court claimed that ATK had relied on an "inapplicable" case in support of its Supremacy Clause challenge, citing to *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435 (Utah 1997). R. 1086. This was not the "*Evans & Sutherland*" case to which ATK had referred in support of its standing argument.

tax exemption despite the direct economic impact that interpretation has on ATK. Because ATK is directly impacted by the unconstitutional interpretation of the privilege tax exemption, third party standing principles do not apply.

In *California Pharmacists Ass'n, et al. v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009), the Ninth Circuit specifically addressed the right of a non-governmental entity to challenge a statute as violating the Supremacy Clause. The court held that such a claim "obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights-based." *Id.* at 851. According to that court, the assertion of a direct economic injury is sufficient to satisfy the traditional standing requirements. *Id.* This principle has also been summarized as follows: "In a nutshell, everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her." "*As Applied and Facial Challenges and Third-Party Standing*," 113 Harv. L. Rev. 1321, 1327 (2000).

The district court's finding that ATK did not have standing to challenge the constitutionality of the privilege tax exemption, despite suffering an economic impact, was based on its misinterpretation of *Shelledy v. Lore*. Shelledy argued that he had standing to assert the Small Business Administration's ("SBA") immunity from taxation in order to void a prior tax sale.[10] However, the SBA had not asserted its own immunity

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[10] Shelledy sued to quiet title in property which had been conveyed to Shelledy by the SBA, a tax-exempt entity. The SBA had acquired the property by quitclaim deed

when the 1984 tax sale occurred. Thus, the Court held that, "while the SBA may have been able to avoid the 1984 tax sale of its property," Shelledy could not assert that unexercised right.

Unlike Shelledy, ATK is asserting its own right to be free from the direct economic impact of an unconstitutional interpretation of a privilege tax exemption. Thus, the district court erred when it repeatedly characterized ATK's claim as an attempt to assert "a violation of the Supremacy Clause on behalf of the federal government." *See* R. 1085–1086, 1090–1091.

If the Commission's interpretation of the exemption is upheld, then ATK will be required to pay privilege taxes on the full value of NIROP even though the value of ATK's interest in NIROP is diminished by the Navy's retention of possession and control. On two separate occasions this Court held that the economic impact of allegedly unconstitutional taxation was a sufficient basis on which to confer standing upon Salt Lake County or its Board of Equalization. Refusal to apply the same standard to the taxpayer in this case is inconsistent, discriminatory, and insupportable. Inasmuch as ATK

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from individuals who had failed to pay property taxes, resulting in a preliminary tax sale to the county. The SBA made no attempt to redeem the property during the four year redemption period and, in 1984, the property was sold to defendant Lore who, together with his successors in interest, did not pay property taxes from 1984 through 1988. In 1998, despite the 1984 tax sale to Lore, the SBA conveyed its interest in the property to Shelledy who "was on record notice of defendants' rival claim to the property by virtue of the 1984 tax deed." 836 P.2d at 790. Shelledy paid the unpaid property taxes for 1984 through 1988 and sued to quiet title against the defendants claiming title under the 1984 tax deed.

is asserting its own right to be free from unconstitutional taxation, this is not a case for application of third-party standing analysis. This Court should apply the traditional standing criteria as advocated by the County in prior cases and reverse the district court's decision.

III. A PRIVILEGE TAX ASSESSMENT AT THE FULL VALUE OF EXEMPT PROPERTY VIOLATES THE SUPREMACY CLAUSE BY TAXING THE OWNER'S RETAINED INTEREST IN THAT PROPERTY.

Where possible, a statute must be interpreted in a manner which is harmonious with state and federal constitutions. *Logan*, 796 P.2d at 700, *see also Due South, Inc.*, 2008 UT 71 ¶ 39 ("We will construe a statute as constitutional wherever possible, resolving any reasonable doubt in favor of constitutionality."). The Supremacy Clause forbids states from imposing a tax on the United States or its agencies. *Thiokol Chemical Corp.*, 393 P.2d at 393.[11] Therefore, if the privilege tax statutes can only be interpreted in a manner which requires assessment on the entire value of government property, regardless of government-imposed limitations on its use, "it is obvious that the tax is also being imposed upon the Government's interest and that is contrary to the Constitution." *United States v. Colorado*, 460 F. Supp. 1184 (D. Colo. 1978), *aff'd*, 627 F.2d 217 (10th

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[11] In *Thiokol*, the government contractor argued that the privilege tax violated the Supremacy Clause because Thiokol was an "agent" of the United States and could not be subject to the tax. The Court refused to find an agency relationship and, on that basis, held that the privilege tax did not violate the Supremacy Clause. The issue before this Court is different in that ATK, a government contractor, does not claim to be an agent of the United States, but claims instead that a privilege tax based on the full value of the exempt property taxes the value of the government's retained interest in that property. This issue was not addressed by the *Thiokol* Court.

Cir. 1980), *aff'd sub nom.*, *Jefferson County v. United States*, 450 U.S. 901 (1981); *The Taxation of Private Interests in Public Property: Toward a More Unified Theory of Property Taxation*, 2000 Utah L. Rev. 421, 453.

Utah law requires a privilege tax assessment in "the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property." Utah Code Ann. § 59-4-101(2). There is no mechanism within the statute to reduce the privilege tax to reflect the value of the user's interest. Multiple courts have rejected privilege tax provisions which require the privilege tax to be calculated based on the full value of the exempt property rather than the value of the taxpayer's beneficial use of the property.

For example, in *Nye County*, Nevada law imposed a tax on otherwise exempt personal property used in connection with a business conducted for profit "in the same amount and to the same extent as though the lessee or user were the owner of the property." 938 F.2d at 1042. The Court observed that the property user had "no leasehold interest in [the property], but merely ha[d] the privilege, terminable at the will of the government, to use the property at the time and place and in the manner directed by the United States." *Id.* at 1043. The Court held that the tax violated the Supremacy Clause of the United States Constitution because it imposed the tax "as if [the user] were the owner of the property" and made "no attempt to segregate and tax any possessory interest [the user] may have in the property." *Id.*

In *Colorado,* government property was operated and managed by a private contractor and the county assessed a privilege tax "in the same amount and to the same extent as though the lessee or user were the owner of such property." 460 F. Supp. at 1187, quoting C.R.S. 1973, § 39-3-112(1). The Court observed that Colorado had "made no effort to identify or to separate the Government's ownership interest from Rockwell's beneficial use of the property at Rocky Flats," thereby disregarding "the need for segregating any beneficial and taxable interest from the full value of Government-owned property ***where there are limitations imposed on the use of that property***." *Id.* at 1189 (emphasis added). The Court found the Colorado statute unconstitutional because it did not "account[] for any of the imposed limitations on Rockwell's use of the property." *Id.*

In contrast, privilege taxes which measure the value of the beneficial use of the property rather than the value of the property itself are routinely upheld. For example, in *United States v. County of Fresno*, 429 U.S. 452 (1977), California law imposed a use or property tax on possessory interests of employees residing in a house owned by Forest Service. The value of the possessory interest was measured by the fair rental value of the property and was, therefore, proportionate to the degree of the employees' beneficial use, with no part of the tax imposed upon the Government's interest in the property. In *United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999), the court upheld a revised privilege tax statute which imposed tax on the value of beneficial use of property rather than full, unapportioned value of the exempt property.

The Sixth Circuit Court of Appeals articulated this principle as follows:

> The use of property of the United States may be taxed to a private contractor, even if the economic burden of the tax is ultimately borne by the United States, but only to the extent that the contractor has the beneficial use of the property. That is, ***a contractor may not be taxed beyond the value of his use.*** The use of property in connection with commercial activities carried on for profit is a separate and distinct taxable activity.

United States v. Hawkins County, 859 F.2d 20, 23 (6th Cir. 1988), *cert. denied*, *Tennessee v. United States*, 490 U.S. 1005 (1989) (emphasis added).

Like the privilege tax statutes which were held unconstitutional in the 1991 *Nye County* case, and in *Colorado*, Utah's privilege tax statute imposes tax on the beneficial use of the property in "the same amount that the *ad valorem* property tax would be if the possessor or user were the owner of the property." Utah Code Ann. § 59-4-101(2). Thus, Utah's privilege tax statute is an all or nothing tax. The statute does not contain a mechanism that would permit an assessor to segregate the interest of the possessor from the interest retained by the government. Without such a mechanism, the privilege tax on ATK is not sustainable. *United States v. New Mexico*, 455 U.S. 720, 741, n. 14 (1982) ("a use tax may be valid only to the extent that it reaches the contractor's interest in the Government-owned property").

The district court held that the privilege tax assessment did not violate the Supremacy Clause because "ATK had 'exclusive possession' of the NIROP Property." R. 1086, 1091. Because the court held that ATK's possession was exclusive, it concluded that the value of ATK's "beneficial use of the NIROP Property was the value of the

NIROP Property." *Id.* The district court's Supremacy Clause analysis was based entirely on its conclusion that ATK had "exclusive possession" of NIROP. Because the district court believed that the owner's retained interest in exempt property does not deprive a user of exclusive possession, the court did not address the issue of whether a tax on the full value of NIROP violates the Supremacy Clause by taxing the value of the exempt owner's retained possession and control.

Inasmuch as the district court acknowledged that the Navy retained possession and control of NIROP, the privilege tax on the full value of NIROP necessarily includes the value of the Navy's retained interest in the property, thereby violating the Supremacy Clause. *Colorado*, 460 F. Supp. at 1189 ("By taxing the totality of the land, improvements and personal property . . . without accounting for any of the imposed limitations on [the contractor's] use of the property, the defendants have subjected the property and activities of the Federal Government to state and local taxation and thereby infringed upon the immunity of the United States from the imposition of taxes on its own property.").

The district court also held that the assessment would survive a Supremacy Clause challenge because "the privilege tax was apportioned according to ATK's beneficial use." The court observed that 15 of the improvements on NIROP were not used by ATK and were not assessed a value by the County. R. 1086–1087. Based on that fact, the district court concluded that the County had "only assessed a privilege tax against ATK for the

actual possession and the actual other beneficial use ATK enjoyed on the NIROP property." R. 1087. This conclusion conflicts with Utah law and the record in this appeal.

First, Utah law requires a privilege tax assessment "in the same amount that the ad valorem tax would be if the possessor or user were the owner of the property." Utah Code Ann. § 59-4-101(2). There is no statutory mechanism which would allow the County to reduce the assessment to reflect only the value of ATK's beneficial use. Moreover, the County has never alleged that the privilege tax assessment was for less than the full value of NIROP. Second, in its factual assertions in support of its own Motion for Summary Judgment, the County explained that the Commission used "the RCNLD cost approach to value . . . with deductions for functional obsolescence and environmental contamination and stigma to the land."[12] R. 953 ¶ 14. Based on that methodology, the Commission found that "[o]f the 181 improvements located at NIROP, 15 no longer contribute value, six contribute less than $1,000 value each, and 16 contribute less than $5,000 value each." R. 953 ¶ 16. Thus, the fact that 15 buildings were not assessed a value simply means that the buildings contributed no value to the NIROP property. The Court's characterization of the assessment as having been "apportioned according to ATK's beneficial use" is simply wrong.

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[12] The Commission's determination of value resulted from a full evidentiary hearing on ATK's appeal of the County's 2000 assessment. R. 953 ¶ 14. Both ATK and the County have agreed that the Commission's assessment includes the full value of NIROP.

It is undisputed that ATK does not have unfettered possession and control of NIROP. The value of ATK's use of NIROP is something less than the value would be if ATK owned the property, had unlimited access, and could use the property without government supervision, limitations, and restrictions. A constitutional privilege tax on ATK's beneficial use of NIROP would require the segregation of ATK's beneficial and taxable interest from the full value of Government-owned property to account for the limitations imposed on ATK's use of the exempt property. *Colorado*, 460 F. Supp. at 1189; *Nye County*, 938 F.2d at 1043. However, because Utah's privilege tax provisions do not allow the imposition of a privilege tax when the beneficial user does not have "exclusive possession" of the property, the correct interpretation of "exclusive possession" preserves the constitutionality of the statute.

CONCLUSION

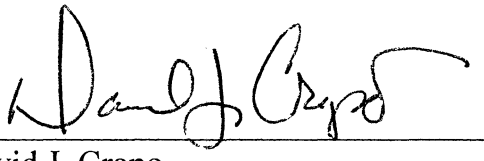
ATK respectfully requests this Court to find that the district court erred when it held that ATK has "exclusive possession" of NIROP even though the Navy maintains a constant presence and retains management and control of NIROP. Inasmuch as Utah law does not allow a privilege tax assessment for a permittee's less than exclusive possession of exempt property, the assessment for ATK's use of NIROP should be abated.

Alternatively this Court should find that ATK has standing to challenge the constitutionality of a privilege tax on the full value of exempt property inasmuch as ATK is directly and economically impacted by that assessment. The Court should also find that

a privilege tax on the full value of exempt property violates the supremacy clause when the value of the beneficial user's interest in that property is diminished by the property owner's retained possession, management, and control.

DATED this 28th day of April, 2010.

WOOD CRAPO LLC



David J. Crapo
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CERTIFICATE OF MAILING

I certify that on the 28th of April, 2010, I caused two true and correct copies of the foregoing ***OPENING BRIEF OF APPELLANT***, as well as a courtesy electronic copy on CD in searchable PDF format, to be mailed in the U.S. Mail, first class postage prepaid, to the following:

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Tab 1

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ALLIANT TECHSYSTEMS, INC., Petitioner, v. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and the GRANITE SCHOOL DISTRICT Respondents.	**FINAL ORDER ON APPLICATION OF UTAH'S PRIVILEGE TAX** Civil No. 030917933 2000 Tax Year Tax Court Judge: JON M. MEMMOTT

The Court has reviewed the parties' cross motions for summary judgment, including the moving and responding papers along with their supporting documentation and the Court's case file. Oral argument was held 26 October 2009, where David J. Crapo appeared for Petitioner Alliant Techsystems, Inc. ("ATK"), Mary Ellen Sloan and Kelly W. Wright appeared for Respondent Salt Lake County Board of Equalization ("BOE"), and John C. McCarrey and Laron J. Lind appeared for Respondent Utah State Tax Commission. After being fully advised in the premises, the Court issued its Ruling on Petitioner's and Respondent BOE's Cross Motions for

Summary Judgment and published the same on 12 November 2009. Consistent with the Court's ruling, the reasons set forth therein, and with good cause appearing therefore,

IT IS HEREBY ORDERED that Petitioner ATK is subject to the privilege tax assessed under Utah Code Ann. § 59-4-101 for tax year 2000. Respondent BOE's Motion for Summary Judgment is GRANTED and Petitioner's Motion for Summary Judgment is DENIED. The Court adopts the factual assertions of the parties' pleadings contained in Respondent BOE's Memorandum in Support of Motion for Summary Judgment and in Petitioner's Memorandum in Support of Summary Judgment and concludes there are no material facts in dispute.[1] Applying Utah law to the undisputed facts, the Court further concludes that ATK was in exclusive possession of the Naval Industrial Reserve Ordnance Plant ("NIROP") as of 1 January 2000, as contemplated in Utah Code Ann. § 59-4-101(3)(e) through its permitted possession and use of the premises under its Facilities Use, Capital Maintenance and Production Contracts and subcontracts, even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. No one else other than the land-owner (*i e.*, the Navy), had any possession, use, management, or control of the NIROP Property during 2000.

IT IS FURTHER ORDERED that the tax imposed under Utah Code Ann. § 59-4-101 does not violate the Supremacy Clause of the United States Constitution. The Supremacy Clause of the United States Constitution creates rights for the federal government, not for private individuals. Under *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), the Utah Supreme Court

[1] When the BOE filed its opposition to ATK's Motion for Summary Judgment, it also filed a Motion to Strike Portions of the Affidavit of Kim Abplanalp. Mr. Abplanalp is the Director of Business Operations for ATK's Space Launch Systems and he had submitted an affidavit setting forth certain facts relied on by ATK in its Motion for Summary Judgment. At the 26 October 2009 oral argument, the Court denied the BOE's Motion to Strike Portions of the Affidavit of Kim Abplanalp.

established a three-part test to determine when a party may assert the constitutional rights of a third party: "First, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted." *Shelledy,* 836 P.2d at 789. The Court finds that ATK cannot establish the second and third requirements under the *Shelledy* test and therefore does not have standing to raise the Supremacy Clause claim.

Even assuming ATK had standing to assert its Supremacy Clause argument, which it does not, the privilege tax assessed against ATK is constitutional. ATK had "exclusive possession" of the NIROP Property. Since ATK's possession was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and no tax was assessed against the Navy.

DATED this 9th day of December, 2009.

Jon M. Memmott

HONORABLE JON M. MEMMOTT
Tax Court Judge

CERTICATE OF SERVICE

I hereby certify that on the ____ day of December, 2009, I caused to be sent via U.S. mail, postage prepaid, a true and correct copy of FINAL ORDER ON APPLICATION OF UTAH'S PRIVILEGE TAX to the following:

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Tab 2

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

ALLIANT TECHSYSTEMS, INC., Petitioner, vs. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and GRANITE SCHOOL DISTRICT, Respondents.	**RULING ON PETITIONER'S AND RESPONDENTS' CROSS MOTIONS FOR SUMMARY JUDGMENT** Case No. 030917933 (Third District Court case number) Judge Jon M. Memmott

This matter is before the Court on the parties' cross motions for summary judgment. The Court has reviewed the moving and responding papers, along with their supporting documentation, and the Court's case file. The Court also held a hearing on October 26, 2009. Having considered all of the arguments, and being fully advised as to the premises, and for the reasons set forth herein, the Court DENIES the Petitioner's motion and GRANTS the Respondents' motion.

BACKGROUND

In the year 2000, Petitioner, Alliant Techsystems, Inc. ("**ATK**"), manufactured missile rocket motors for private companies who, ultimately, provided these missile rocket motors to the United States Navy. ATK used property known as the Naval Industrial Reserve Ordinance Plant (the "**NIROP Property**") to produce these missile rocket motors. The NIROP Property was

comprised of six (6) parcels constituting approximately 528.48 acres of land and 181 improvements. The United States Navy (the "**Navy**") owned the NIROP Property and ATK used the NIROP Property under a facilities use agreement. This contract allowed ATK to use the NIROP Property on a rent-free non-interference basis. No other private company used the NIROP Property for any purpose and no other entity had a facilities use contract permitting use of the NIROP Property. However, the Navy had one (1) building and maintained fourteen (14) employees to manage the NIROP Property and inspect ATK's operations.

Of the 181 improvements on the NIROP Property, ATK used 165 in connection with its operations, the Navy used 1 for maintenance of the NIROP Property and oversight of ATK and its operations, and 15 were vacant.

In 2000, Salt Lake County assessed ATK a privilege tax against the NIROP Property, pursuant to Utah Code Ann. § 59-4-101, based on the value of the property possessed or beneficially used by ATK. The Salt Lake County assessor determined that 144 of the improvements contributed 99.7% of the value of the NIROP Property, and that 15 of the improvements contributed no value.

ATK has exhausted all of its administrative remedies through the Utah State Tax Commission and comes to the Court seeking relief from the assessed privilege tax imposed under Utah Code Ann. § 59-4-101 based on an exemption found in subsection 3(e) of the statute. ATK argues that the Navy's retained control of the NIROP Property resulted in ATK having less than "exclusive possession." ATK also argues that assessing a privilege tax according to the full value of the property was a violation of the Supremacy Clause of the United States Constitution as a tax on the federal government's retained interest in the NIROP Property.

Respondents argue that ATK was subject to the privilege tax under Utah Code Ann. §59-4-101. Respondents argue that ATK did not qualify for the exception to the tax contained within subsection 3(e) because ATK did not have a lease, permit, or easement from the Navy and/or because ATK had exclusive possession of the NIROP Property.

Following a telephone conference on issues before this court,[1] a complete briefing of the parties' cross motions, and at the conclusion of the October 26, 2009 hearing, the Court took the matter under advisement. Accordingly, the cross motions are now ripe for determination.

ANALYSIS

Summary judgment is appropriate only when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

Here, the parties acknowledged at the October 26, 2009 hearing that the relevant material facts to the parties' motions for summary judgment are not disputed. The court will therefore adopt the factual assertions of the parties' pleadings as its findings in this case. (See Petitioner's Memorandum in Support of Motion for Summary Judgment; Respondents' Memorandum in Support of Motion for Summary Judgment.). Accordingly, the Court shall make its determination on the parties' motions for summary judgment as a matter of law. Two issues are presented for the Court's determination.

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[1] According to the strict reading of the parties' Settlement Agreement dated October 1, 2007, the parties were only to litigate the issue of whether ATK can claim an exemption to the privilege tax (See Joint Motion for Entry of Order Resolving All Valuation Claims and for Stay Pending Transfer and Reassignment for Further Proceedings) During the September 11, 2009 telephone conference with the parties, the Court inquired whether the Settlement Agreement barred ATK's Supremacy Clause argument. Following the telephone conference, however, the parties informed the Court of their stipulation and agreement that the Settlement Agreement does not bar ATK from raising its Supremacy Clause argument with the Court Accordingly, this Ruling will address both of the issues raised by ATK

I. Can ATK claim an exemption to the privilege tax assessed under Utah Code Section 59-4-101?

"[A] tax is imposed on the **possession or other beneficial use** enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit." Utah Code Ann. § 59-4-101(1)(a) (emphasis added). However, a tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to **exclusive possession** of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e) (emphasis added).

It is not disputed that the NIROP Property was exempt from state property taxation because it was owned by the federal government. See Utah Code Ann. § 59-2-1101(3)(a). Further, it is undisputed that ATK used the NIROP Property in connection with a business conducted for profit. Accordingly, the only remaining issues in this matter are: A) Did ATK have a permit[2] entitling it to use or possession of the NIROP Property; and B) Did ATK have exclusive possession of the NIROP Property?

A. Did ATK have a permit to use the NIROP Property?

According to Black's Law Dictionary, the terms "permit" and "license" are synonymous and a "license" is defined as "[a] revocable permission to commit some act that would otherwise be unlawful . . . ." Black's Law Dictionary 418, 524 (2d Pocket ed. 2001). Pursuant to ATK's facilities use agreement, ATK had permission to occupy and use the NIROP Property, something that would otherwise be illegal (as a trespass) absent the Navy's permission. When asked at the October 26, 2009 hearing what ATK had, if not a lease, a permit, or an easement, Respondents'

[2] Respondents argue that ATK did not have a lease, permit, or an easement ATK argues that it had a permit There is not contention that ATK had a lease or easement with regard to the NIROP Property

were without an answer and readily admitted their argument that ATK did not have a permit was "weak." The Court agrees and, accordingly, finds that the facilities use agreement is a permit.

B. Did ATK have exclusive possession of the NIROP Property?

Whether ATK had exclusive possession of the NIROP Property "is a matter of statutory construction and therefore is a conclusion of law." Gull Labs., Inc. v. Utah State Tax Comm'n., 936 P.2d 1082, 1084 (Utah Ct. App. 1997). This Court is to "construe statutes that grant exclusions from taxation strictly against the party seeking an exemption, and that party, accordingly, bears the burden of proving that it qualifies for the exemption sought." Id. (quotations omitted). See also, Great Salt Lake Minerals & Chemicals Corp. v. State Tax Comm'n. of Utah, 573 P.2d 337, 340 (Utah 1977) ("Exemptions from taxation are to be strictly construed and all ambiguities are to be resolved in favor of taxation."). Further, this Court will "read the words of a statute literally unless such a reading is unreasonably confused or inoperable . . . [and] presume that the statute is valid and that the words and phrases used were chosen carefully and advisedly." Gull Labs., Inc., 936 P.2d at 1084 (quotations omitted).

ATK argues it did not have exclusive possession of the NIROP Property because the Navy retained some amount of management and control of the NIROP Property. ATK relies on Keller v. Southwood North Medical Plaza, Inc. to argue that a lease transfers exclusive possession but that a permit does not. 959 P.2d 102, 107 (Utah 1998). While this interpretation may be appropriate for forcible entry actions, such as in Keller, this interpretation would render the language of Utah Code Ann. § 59-4-101 non-sensical. By their very definition and operation, a lease, a permit, and an easement transfer less than the full bundle of rights held by the landowner. Additionally, the language of the statute contemplates that a person may have exclusive possession under a lease, a permit, or an easement. See Utah Code Ann. § 59-4-

101(3)(e). If, as ATK argues, the statute's use of exclusive possession excepted the retention of management and control by the landowner (i.e. the Navy), the privilege tax could only be assessed against a landowner in fee-simple. Such a reading is "unreasonably confused and inoperable," because the landowner in fee simple, the Navy, is exempt from property taxes under Utah Code Ann. § 59-2-1101(3)(a). Gull Labs., Inc., 936 P.2d at 1084 (quotations omitted).

Moreover, in this matter, much of the management and control exercised by the Navy on the NIROP Property was ancillary to ATK's operations and, therefore, beneficial to ATK. Cf. Loyal Order of Moose v. County Bd. Of Equalization of Salt Lake County, 657 P.2d 257, 261-63 (Utah 1982). For example, the Navy used their office at ATK's administration building in Plant One to provide technical assistance to ATK in their fulfillment of Navy contracts. Additionally, the fourteen (14) Navy personnel were on site to manage the NIROP Property and assist ATK in the fulfillment of Navy contracts.

Accordingly, because the Court is to interpret taxation statutes strictly against ATK, and since there is a presumption that the statute is valid, the Court concludes that ATK was in exclusive possession of its permit, as contemplated in Utah Code Section 59-4-101(3)(e), even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. ATK has presented no evidence or argument that anyone other than the Navy, the land-owner, had any possession, use, management, or control of the NIROP Property during 2000. Accordingly, the Court finds that ATK has not met its burden and is not able to avoid the privilege tax assessed under Utah Code Section 59-4-101.

II. Is the tax imposed under Utah Code Section 59-4-101 a violation of the Supremacy Clause of the United States Constitution?

ATK argues that the privilege tax Salt Lake County assessed against ATK was a violation of the Supremacy Clause of the United States Constitution because such tax was based on the full value of the NIROP Property and was not apportioned for the management and control retained by the Navy. See U.S. Const. art. VI, § 2. However, the Court finds that ATK does not have standing to raise this issue on behalf of the United States government.

The Supremacy Clause of the United States Constitution creates rights for the federal government, not for private individuals. Id. In Shelledy v. Lore, the Utah Supreme Court established a three-part test to determine when a party may assert the constitutional rights of a third party. 836 P.2d 786, 789 (Utah 1992). Under this test, the following factors must be established:

> First, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted.

Id.

In this matter, even assuming the presence of a substantial relationship between ATK and the federal government, there is no impossibility of the federal government raising its own rights under the Supremacy Clause[3] and there is no dilution of the federal government's rights by finding that ATK does not have standing to raise a claim on the federal government's behalf.

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[3] In all cases cited by ATK in support of its argument that the assessment of the privilege tax is a violation of the Supremacy Clause, the United States is the party asserting its own rights under the Supremacy Clause See e g U S v County of Fresno, 429 U S 452 (1977), U S v Nye County, 178 F 3d 1080 (9th Cir 1999), U S v Nye County 938 F.2d 1040 (9th Cir 1991), U S v Hawkins County, 859 F.2d 20 (6th Cir 1988), U S v Colorado, 627 F 2d 217 (10th Cir 1980)

Accordingly, the Court finds that ATK cannot establish the second and third requirements under the Shelledy test.

ATK argues that Evans & Sutherland Computer Corporation v. Utah State Tax Commission allows the Court to hear constitutional issues raised by a party on behalf of a third party when interpreting the constitutionality of a statute. 953 P.2d 435 (Utah 1997). In Evans & Sutherland Computer Corporation, however, the constitutional rights being asserted are those of the defendant, not a third party, and thus, the case is inapplicable to this matter. Id. Accordingly, the Court finds that ATK does not have standing to assert that the assessed privilege tax is a violation of the Supremacy Clause on behalf of the federal government.

Further, the Court notes that even assuming ATK has standing to assert their Supremacy Clause argument, the privilege tax assessed against ATK would not be unconstitutional. ATK argues that Salt Lake County assessed the privilege tax against both their beneficial use and against the rights retained by the Navy. However, Utah Code Ann. § 59-4-101 provides that "a tax is imposed on the **possession or other beneficial use** enjoyed by any person . . . ." Utah Code Ann. § 59-4-101(1)(a) (emphasis added). The Court has already found that ATK had "exclusive possession" of the NIROP Property. If ATK's possession of the NIROP Property was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and there was no tax assessed against the Navy. See U.S. v New Mexico, 455 U.S. 720, 741-42 (1982).

Additionally, and contrary to ATK's assertions, the privilege tax was apportioned according to ATK's beneficial use. ATK exclusively possessed and/or beneficially used all but

15 of the improvements on the NIROP Property.[4] Salt Lake County did not assess a privilege tax against the unused buildings as they were found to have no value. Accordingly, Salt Lake County only assessed a privilege tax against ATK for the actual possession and the actual other beneficial use ATK enjoyed on the NIROP Property. [5]

CONCLUSION

Accordingly, ATK's arguments in favor of summary judgment are without merit. Based on the foregoing, the Court must DENY the Petitioner's motion for summary judgment and GRANT the Respondents' motion for summary judgment. The Court directs Respondents to prepare and submit an order that is consistent with and reflects this Ruling. Further, in accordance with Rule 6-103(6) of the Utah Code of Judicial Administration, the Court shall order this Ruling published.

Date signed: 11/12/09

DISTRICT COURT JUDGE
JON M. MEMMOTT

[4] ATK may argue that there are 16 improvements that were not used by ATK, i e as the Navy used one of the buildings. However, the Navy's use of that building was for ATK's benefit to supervise ATK's operations and maintain the NIROP Property. Accordingly, the Navy administration building was beneficially used, if not exclusively possessed, by ATK

[5] The Court notes that ATK failed to argue that the privilege tax assessed is a violation of the Equal Protection Clause of the United States Constitution See U.S Const amend XIV However, the Court believes that, for the same reasons the tax would not violate the Supremacy Clause, it does not violate the Equal Protection Clause

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON PETITIONER'S AND RESPONDENTS' CROSS MOTIONS FOR SUMMARY JUDGMENT** postage pre-paid, to the following on this date: 11/12/09.

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